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Communities Against a Radioactive Environment

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Peace Justice Environment since 1983

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Time Sensitive Public Comments on Department of Homeland Security Proposed Management Directive 5100.1, Environmental Planning Program 69 Fed. Reg. 33044 containing policy and procedures for implementing the National Environmental Policy Act of 1969 (NEPA)– deadline: July 14, 2004

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To Whom It May Concern:

Tri-Valley CAREs is a nonprofit organization that monitors the activities of the U.S. Department of Energy (DOE), including the biological research activities of the Department of Homeland Security (DHS) within the Department of Energy complex at the Lawrence Livermore National Laboratory and other facilities.

Founded in 1983, Tri-Valley CAREs conducts research and educates decision-makers and the public about DOE and DHS activities. Our methods of informing the public include but are not limited to producing materials such as technical reports, policy papers, testimony for public hearings, fact sheets and a monthly newsletter, "Citizen's Watch."

The DHS is currently involved in biological agent research at the DOE's Lawrence Livermore National Lab. Tri-Valley CAREs has expressed grave concerns about the safety ramifications and possible proliferation impacts of collocating a high-level biological research program inside a highly classified nuclear weapons laboratory in close proximity to a major metropolitan area. We monitor these activities because we are concerned not only about possible accidents and releases but also about the world's perception of US research in this area and transparency about appropriate aspects of biological research.

The National Academy of Sciences has recently concerned itself with addressing the perceived "dual use dilemma" associated with this research. This relates to the difficulty that oversight agencies will have in verifying that research in this area is in fact "peaceful" and does not violate United States obligations under the Biological Weapons Convention of 1972. The country must consider the very real problem of conducting its biological agent research in a manner that we

would not want to encourage in other countries. We must avoid setting the undesirable precedent of shrouding biological agent research in secrecy.

We are therefore very concerned about the proposed rulemaking that would affect the DHS' compliance with one of the nation's most important environmental laws, the National Environmental Policy Act (NEPA). This proposed rule imposes extraordinary barriers in access to environmental information about proposals that could significantly impact our nation's air, water and soil. Specifically we are referring to two provisions: Section 6.2 which will result in many NEPA review documents being suppressed from public oversight and section 3.0 that will create new categories of impacts that will receive a Categorical Exclusion from NEPA review.

Section 6.2 Secrecy Provisions

DHS is proposing to restrict the information that will be released to the public in its NEPA reviews by choosing not to disclose information that is exempted by the Freedom of Information Act, Critical Infrastructure Information, Sensitive Security Information, DHS management Directives or information that is protected by other laws, regulations, or Executive Orders prohibiting or limiting the release of information.

This mélange of withholding justifications sends a clear message that DHS is asserting a presumption that if any reason exists to withhold information from the public, the DHS has chosen to err on the side of withholding rather than establish a policy that favors disclosure. We argue that in order for the public and decision makers to participate in government decisions likely to have a significant effect on the environment, the risks and plans must be publicly explained and the public must be provided the opportunity to comment. At the heart of NEPA is public oversight. NEPA was designed to facilitate an interactive process whereby citizens can comment by providing insights and criticisms to the officials about their proposals and influence the outcome of the project.

For years, federal government bodies have had the ability to fence some vital information out of the NEPA process provided that the information went through the appropriate classification procedures. Classified appendices have been issued in the past by federal agencies where the agency believed it was warranted. While this may be warranted on occasion, a blanket exemption is likely to be abused and would suppress vast amounts of environmental information. We are concerned that information that DHS would like to withhold for reasons other than national security can be easily categorized under one of these exceptions. There is no external monitoring entity that would ensure this rule is not abused. Moreover, this exception should not apply to the reference documents underlying the DHS' conclusions – those should remain within the public domain so that the public can evaluate the foundational information and assumptions upon which the project is evaluated and approved.

DHS claims that it will move any protected information from documents to an appendix for decision makers only; the public could review all other parts of information generated under NEPA. However, DHS states, "if segregation would leave essentially meaningless material, the DHS elements will withhold the entire NEPA analysis from the public." DHS might consider an analysis to be "meaningless" to the public, but the public could find the information extremely

useful. There are no procedures contained in the directive for how DHS will determine which pieces of environmental analysis to review if it falls within an exception, or how it will determine if the public finds the information meaningful.

We urge the DHS to avoid the unnecessary result of withholding information based upon a presumption of withholding rather than carefully evaluating each NEPA document and erring on the side of disclosure. This encroaches far too broadly into the public's right to know about significant environmental decisions that will affect their lives. Moreover, we find DHS' draft directive more exclusionary and tilted toward classification than DOE's NEPA implementing regulations. This is an ironic and unfortunate situation.

FOIA Exempted Information 5 U.S.C. 552

NEPA is designed to complement FOIA and the text of NEPA specifically includes provisions that encourage reviewers to utilize FOIA to enable them to comment intelligently on NEPA documents: Agencies shall "Make environmental impact statements, the comments received, and any underlying documents available to the public pursuant to the provisions of [FOIA]." 40 CFR 1506.6(f). FOIA is designed to provide documents in an expedited fashion. Of course agencies are not required to release documents that fall within the exceptions enumerated by FOIA. DHS should make a commitment within its rules to expedite FOIA requests that concern matters that should be addressed during the pendency of the public comment period so that commenting agencies and the public can have the information they need to provide meaningful comments.

Sensitive Security Information (For Official Use Only) as defined by DHS Management Directive 460.1, 49 CFR Part 1520, and E.O. 12958 and the DHS Management Directive 11042

The sensitive but unclassified information (such as For Official Use Only), as defined by DHS directives, is defined too broadly to meaningfully protect the public from excessive withholding of information. Any DHS employee or contractor can designate documents as FOUO if it is regarded to be in one of eleven broad categories. There is no oversight body empowered to review or challenge the legitimacy of these sensitive designations, once bestowed. The National Research Council stated its criticism of these types of fuzzy classifications.

> This self-governance approach to making decisions about publication is different from the federal government's restriction on public access to "sensitive but unclassified" information in the life sciences, the report notes. Experience shows that vague categories of this kind generate great uncertainties among both scientists and officials responsible for enforcing regulations. The inevitable effect is to stifle scientific creativity and weaken national security. *–National Research Council Press Release, October 8, 2003.*

We find FOUO and other "sensitive but unclassified" categories to be an irresponsible system for protecting important information that cuts too deeply into the rights of individuals who will be directly impacted by environmental harms. Moreover, under the proposed rule, there is simply no oversight mechanism to ensure that DHS does not abuse its rights. The rule mentions " a team

of cleared personnel" who will review the classified or *protected* material for legal compliance. This is an untenably partial allocation of agency oversight that is tantamount to the case of the fox guarding the henhouse. If this information is to be reviewed at all, this review will only be useful if it is independent. An independent, neutral, external body should be assigned to review all "sensitive" and "classified" documents to determine whether withholdings are warranted.

We believe the DHS directive should be rewritten to remove section 6.2 on Classified or Protected Information (1507.3(c)). We feel that this section dilutes NEPA and fails to prevent abuse of FOUO and other sensitive information designations.

Section 3.0 Categorical Exclusions

In addition to the secrecy proposals outlined above, DHS is also proposing several changes to its categorical exclusion policy that merit revisions.

1. DHS indicates that three considerations must be made in determining the applicability of a categorical exclusion. First, the action must clearly fit the enumerated category of exclusions. Second, the action must not be a small piece of a larger action. Third, the action does not have any extraordinary circumstances. Are these three considerations determinative, in the sense that if the action fails to meet all three, it may not be categorically excluded? Section 3.2 states that "the DHS element must satisfy each of the following three conditions" (emphasis added). Yet section 3.2(C) states that "Specific actions that might otherwise be categorically excluded, but are associated with one or more extraordinary circumstances, should be carefully evaluated to determine whether a CE is appropriate." This seems to indicate that an action might still receive a categorical exclusion even where extraordinary circumstances exist. Is this the case? If so, in what sense must "the DHS element ... satisfy each of the ... three conditions"? NEPA requires that agencies shall provide more thorough environmental reviews when there are extraordinary circumstances. 40 C.F.R. 1508.4. If these proposed regulations would still allow a categorical exclusion for actions with extraordinary circumstances, they fail to meet NEPA's requirements. Please clarify. DHS should unequivocally disallow categorical exclusions where extraordinary circumstances exist.

2. In section 3.3(B), DHS creates a second-order classification of categorical exclusions for "[a]ctivities that involve greater potential for environmental effect." These activities require a Record of Environmental Consideration (REC), or actual paperwork documenting the decision-making process. This requirement is a positive step, but it does not go far enough. Recent Ninth Circuit cases demonstrate that such documentation is necessary for all categorical exclusions, not just a select few.

In California v. Norton, a recent Ninth Circuit case, the state of California, joined by environmental groups, sued the United States Department of Interior for granting suspensions of offshore oil leases to oil companies, allowing extended drilling rights where the leases would have otherwise expired. Norton, 311 F.3d at 1164-65. DOI did not prepare an EA or an EIS before suspending the life of the leases. Id. The Ninth Circuit, in finding for the State, determined that the DOI did not adequately document its reliance on a categorical exclusion since there was no paperwork or evidence of an actual evaluation. It remanded the case back to

the district court, giving the DOI an opportunity to explain why it gave itself a categorical exclusion. Id. at 1178. The Court held that in deciding whether to claim a categorical exclusion, an agency must actually consider and evaluate the environmental risks of the proposed action. "Post hoc invocation" is not sufficient to "[assure] that the agency actually considered the environmental effects of its action before the decision was made." Norton, 311 F.3d at 1176.

If an agency does determine that no EA or EIS is needed, it must still "adequately explain" that decision. Alaska Ctr. for the Env't v. United States Forest Serv., 189 F.3d 851, 859 (9th Cir. 1999). The Ninth Circuit has held that, "An agency cannot avoid its statutory responsibilities under [NEPA] merely by asserting that an activity it wishes to pursue will have an insignificant effect on the environment. Instead, an agency must provide a reasoned explanation of its decision." Jones v. Gordon, 792 F.2d 821, 828 (9th Cir. 1986)(quoting Steamboaters v. FERC, 759 F.2d 1382, 1393 (9th Cir. 1985)(emphasis added).

Even if DHS concludes that it is not legally obligated to issue documentation of its categorical exclusions, doing so is still important for accountability reasons. Citizens should be aware of the operations of government, and requiring DHS documentation of categorical exclusions furthers that public right. Public monitoring and accountability can only occur when an agency decision is documented, allowing the public to ensure compliance. There is no way to check DHS's applications of categorical exclusions if the public has no way of knowing that an exclusion was applied in the first place. Additionally, such paperwork will make DHS's job easier in the event of a categorical exclusion lawsuit. Being able to demonstrate the actual consideration of the issues in 3.2 A, B, and C will make litigation substantially easier for DHS.

As a policy and legal matter, DHS should therefore require documentation of the application of categorical exclusions for all categories, not just those denoted with asterisks.

3. In 3.3(B), DHS states, "A REC is a means of documenting whether the conditions listed in 3.2 A, B, and C are met." Will a REC also address the subparts contained within the particular subparts of a given categorical exclusion? For example, if the agency were claiming an exclusion under E2, would it need to discuss the five conditions in that categorical exclusion (zoning compatible, already developed, no increase in vehicles, consistent site and scale, and within infrastructure capacities) as well as the three conditions in 3.2 A, B, and C (clearly fits the category, not part of a larger action, and no extraordinary circumstances)? How can the agency expect to discuss eight important factors in a document that "will normally not exceed two pages"? Even though the page limit is not strict, it will likely have the effect of limiting the depth of explanation for categorical exclusions. The reference to a page limit should be removed, and the REC should consider the subparts within the categorical exclusion, enabling the documentation to be as long as it needs to be to justify the use of the categorical exclusion.

4. Several of the specific categorical exclusions are unjustified, as they are not activities "which do not individually or cumulatively have a significant effect on the human environment." 40 C.F.R. § 1508.4. The following should be removed from the list altogether. Failing that, the categories below that are currently not denoted with an asterisk (B10, D3, E5, F1, F2, F3, G1, and H2) should be included among those categorical exclusions that require a Record of Environmental Consideration.

B8*: B8 would exclude the use of certain security equipment from NEPA review. However, many security devices, including x-rays and detection devices, would include the use of dangerous chemical, biological, and radiological substances. Additionally, the "evaluation" and "disposal" of these devices could pose a significant risk to the environment and to the public.

B9*: B9 would also exclude security activities from review, and has the same problems as B8 regarding x-rays and hazardous agents. Additionally, B9 would include "diver/swimmer detection devices" which could adversely affect marine species and habitats. The "evaluation" of "Blast/shock impact-resistant systems" could certainly have a significant impact on a variety of environmental concerns including migratory birds, endangered species, and air quality/emissions therefore making a categorical exclusion unwarranted.

B10: B10 would exclude certain aircraft operations from requiring an EA or EIS, yet it does not account for the resultant increase in emissions and noise pollution or for the potential interference with migratory bird routes.

B13*: B13 would exclude tree harvesting from review. However, this practice could have a significant impact on the environment since it does not account for endangered species, critical habitat, or ecological balance. Additionally the allowance of "commercial thinning" is inappropriate for a categorical exclusion, and commercial considerations could unduly color the ecological evaluation.

B14*: B14 would also allow the harvest of dead or dying trees, and could suffer from the same problems as B13.

D3: D3 applies to repair and maintenance, and includes "pest control activities." However, there is no limit on the types of pest control activities that may be taken, and such unrestricted allowance could have substantial effects on endangered species, ground water toxicity levels, and public health.

D5*: D5 excludes dredging activities from review. However, dredging can have an extremely detrimental effect on marine and riparian habitats, effecting endangered species, critical habitat, water flow, flooding, waste management, and a host of other environmental concerns.

E4*: E4 excludes demolitions from review, but makes no provision to prevent the destruction or disruption of adjacent habitat. The exclusion asserts that activities will be in compliance with other regulations. This is a positive step, but it does not state whether or not projects could still continue even when they have a significant effect on the environment.

E5: E5 would exclude resource management activities to "enhance" native plants and animals. While the DHS should certainly take measures to mitigate its effect on the environment, management activities have historically disrupted ecological balances and caused further environmental problems. Any attempt to significantly alter the natural environment, whether through destruction or "enhancement," should be subject to NEPA review so the public, including independent biologists, can analyze the proposed activity for its ecological soundness.

E9*: E9 applies to construction and operation of wells, septic systems, and field instruments. E9 mentions "environmentally sensitive" areas, but fails to give any guidance to field agents in determining whether an area is environmentally sensitive. The construction and operation of septic systems in particular could have devastating effects on local groundwater, as well as flora ecosystems. E9 also fails to account for the potentially disruptive effects of field instruments.

F1: F1 excludes routine uses of hazardous waste from NEPA review. However, no standard exists by which to measure "routine." Absent a deeper explanation of the activities being excluded, this categorical exclusion could easily become a rubber stamp to nearly all agency activities with hazardous waste. Additionally, the categorical exclusion of these activities would mask the cumulative effects of routine hazardous waste use at agency facilities. This would contradict the CEQ NEPA guidelines. 40 C.F.R. § 1508.7, 1508.8. It is striking that DHS has determined that the routine uses of hazardous waste "inherently [has] no potential for significant environmental impacts." Categorical Exclusions (CE) Administrative Record Summary. At the very least, such activities deserve a REC, as well as further elaboration within the text of the categorical exclusion.

F2: F2 would allow use of hazardous and radiological devices without NEPA review. While not every device needs an EA or EIS, the categorical exclusion is too broad since it does not provide an exception for devices with a significant amount of hazardous or radiological risk and/or waste. It also sets no limit on the cumulative use of such devices.

F3: F3 similarly would exclude detection and scanning devices, which in sufficient numbers, or with sufficient radiological effects, could pose a significant threat to the environment and public health.

G1: G1 would allow training exercises using live chemical, biological, and radiological agents only at locations designed and constructed for such training. While the limitation to such facilities is better than allowing training at any facility, it does not go far enough. Any training exercises that use live chemical, biological, or radiological agents should be subject to NEPA review. These are weapons of mass destruction, and their use, even in training exercises, even at special facilities, is not to be taken lightly. There are far too many variables that must be considered. Regardless of the facility, the use of live agents cannot be said to "inherently have no potential for significant environmental impacts." Categorical Exclusions (CE) Administrative Record Summary. At the absolute least, such activities should require the elevated REC review.

H2: H2 would exclude TSA grants for "security-related research." It is not clear to whom such grants would be given. This categorical exclusion could potentially allow TSA to pass off many potentially hazardous activities to the private sphere. Since NEPA applies only to government agencies, this security-related research would largely be exempt from public scrutiny for environmental effects. The potential for significant environmental effects is substantial. While this may not be considered a "direct effect," NEPA still requires review where there are "indirect effects, which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable." 40 C.F.R. § 1508.8.

Additionally, due to the dramatic impact this rule will have on DHS implementation of NEPA, we urge you to hold public hearings on this rulemaking around the country and extend the public comment period by ninety days. We were notified by a colleague organization about this proposed rule change ten working days ago and believe that many groups who may be affected by this rule are similarly situated.

Sincerely,

Loulena Miles

Loulena Miles
Staff Attorney